Remarks of
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Coping with U.S. Export Controls 2010
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A little more than a year ago, President Obama directed Secretaries Gates, Clinton, and Locke, together with the National Security Council staff, to conduct a thorough review of the U.S. export control system. The goal was to identify ways to strengthen national security, as well as the competitiveness of key U.S. manufacturing and technology sectors, by focusing on current threats and adapting the system to the changing economic and technological landscape.

Last April, Secretary of Defense Robert Gates set out the Administration's conclusion that these goals could be accomplished only through fundamental reform. The system, he said, "has the effect of discouraging exporters from approaching the process as intended. Multinational companies can move production offshore, eroding our defense industrial base [and] undermining our control regimes in the process." Moreover, he continued—the time for change is long overdue. If the application of controls on key items and technologies is to have any meaning, we need a system that dispenses with 95 percent of "easy" cases and lets us concentrate our resources on the remaining 5 percent. By doing so, we will be better able to monitor and enforce controls on technology transfers with real security implications while helping to speed the provision of equipment to allies and partners who fight alongside us in coalition operations.

In August, the President, Secretary Locke, and others further described how the end result of the reform effort would be a *single* control list administered by a *single* licensing agency running on a *single* information technology platform and enforced by a *single* primary export enforcement coordination agency. The structural reforms require congressional action but the other two major elements–working toward a single control list and a single I.T. system–largely can be achieved through administrative action.

I cannot announce today that we have completed the effort but, to borrow from Winston Churchill, we are at the end of the beginning. This week, the Departments of State and Commerce will issue proposed regulations that begin the process of aligning the Commerce Control List and the U.S. Munitions List into parallel-constructed lists, pursuant to two fundamental objectives:

(1) controlling items based on objective technical parameters, or in export control parlance, "positive lists," that do not overlap; and

(2) segregating items by tier, in order to focus on the most sensitive items while permitting more flexible authorizations for more mature technologies that are more widely available.

Reforming the Control Lists

The USML

The most important aspect of control list reform may be making the USML a "positive" list. Currently, the USML controls many defense articles based on "design intent," in part because at one time, the majority of items used by the military were produced specifically for the military. Today, however, many—if not most—technologies used by the military are developed and manufactured by the commercial sector.

The design-intent nature of the USML also runs counter to a predictable and transparent regulatory process—one where industry readily and objectively can determine what is controlled. The absence of this ability has fueled an increase in commodity jurisdiction disputes. This has resulted in many commercial systems being ruled subject to ITAR control or jurisdictional decisions being delayed, thereby impeding the competitiveness of U.S. items or, even worse, resulting in their being "designed out" of foreign end products.

Under the leadership of the Defense and State Departments, the Administration is addressing this problem by converting the USML to a positive list. The Department of State will issue this week a proposed regulation that would revise Category VII of the USML—Tanks and Military Vehicles—into a positive list. This would focus the category's controls on truly significant military items, while moving less significant items—particularly parts and components that do not serve an inherently military function—to the Commerce Control List. The process for such moves, and for control on the Commerce Control List, will be described in detail early next year.

You may have seen the Update speech where Secretary Locke displayed two functionally equivalent pivot blocks that hold wheel axle assemblies together. One can be exported to China, without a license, for use in the axle of a fire truck. Export the other, which is designed for a military vehicle and almost imperceptibly different, to China and you'll end up in jail. Control for insignificant items whose function isn't inherently military results in unnecessary burdens, particularly for small- and medium-sized businesses. Ameliorating such burdens, which divert the time, energy, and resources of the Government as well as exporters, is an essential aspect of this reform.

Concurrently with the proposed Category VII rewrite, State will seek public comment on converting the remaining USML categories into positive lists. This is your chance (and that of your clients) for input on this critical aspect of the project. It's *very* important that those affected participate. The Department of Defense has an ambitious plan for completing its work on this review in 2011. State and Defense are working hard on this project, and the President's vision of a reformed export control system could not be accomplished without it.

The CCL

The USML is not the only focus of attention. Although the CCL is largely a "positive" list that describes items using objective criteria, it is not wholly so. We seek to make it sufficiently "positive," clear, and precise, so that someone who isn't an expert on U.S. export controls but understands the technical characteristics and capabilities of an item, accurately can determine its jurisdictional status and classification.

For these reasons, later this week the Commerce Department will seek public comment on how to improve CCL entries that are unclear or that use vague, open-ended, or subjective criteria. Where ECCNs lack objective criteria, we want specific suggestions on what technical parameters, characteristics, thresholds, and capabilities should be used to describe the items controlled. All suggestions should propose revisions *to the text* of ECCNs or propose Technical Notes to ECCNs that explain terms or phrases used in the ECCN. Each suggested change should

be accompanied by an explanation, with supporting materials if available, of why the proposed change is appropriate and would make the ECCN more clear and positive.

Public input to these control list exercises is *important*. The Government does not have perfect knowledge about every item that may be affected by the bright line or tiering exercises. In constructing positive lists that are consistent with internationally accepted standards, use industry-standard terms and references, and reflect the availability of items outside the United States and its partners and allies, we want to take advantage of the public's resources and knowledge.

All this work, including public input on the lists, is necessary to reach the point where the lists can be combined into a single clear, positive list. In the interim, the consistency that we seek from the review process will create more clarity and eliminate certain items from being subject to both lists. If a particular type of item *is* controlled on both lists, we expect that objective technical parameters will distinguish whether a particular version is subject to USML or CCL control.

Parallel-Tiered Control Lists

The second part of this exercise will be to convert the USML and CCL into parallel-constructed, three-tiered lists that allow the Government to focus controls on the most sensitive items while "cascading" controls on more mature, less critical technology to enable less stringent treatment.

To implement this tiered construct, the U.S. Government has developed control list criteria:

> Tier 1 items are weapons of mass destruction or are almost exclusively available from the United States that provide a critical military or intelligence advantage. These are what Secretary Gates has termed our "crown jewels."
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> Tier 2 items are almost exclusively available from regime partners or adherents and provide a substantial military or intelligence advantage, or make a substantial contribution to the indigenous development, production, use, or enhancement of a Tier 1 or Tier 2 item.
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> Tier 3 items are more broadly available and provide a significant military or intelligence advantage or make a significant contribution to the indigenous development, production, use, or enhancement of a Tier 1, 2, or 3 item, or are other items controlled for national security, foreign policy, or human rights reasons.

The Government would then apply licensing policies associated with the tiers. On the dual-use side, my Department has prepared a proposed rule that would begin the process of implementing revised licensing policies. If adopted, these policies would focus controls on the most sensitive items, while facilitating exports—to specified destinations—of less sensitive items. We expect to publish this proposal later this week.

With these changes in licensing policies would come new safeguards. These would include acknowledgements by foreign purchasers of the need to control the items in accordance with U.S. law, reexport controls to destinations outside those eligible for the new license exception, and authority for U.S. compliance and enforcement personnel to audit records of eligible exports.

We will then turn our attention to "tiering" the CCL in an effort to further focus our licensing policies on items warranting control while providing flexible authorizations for items that are

more widely available or are determined to be less significant. This aspect of the effort, like the others, is a *cooperative* endeavor among the Defense Department—including the military services—the State Department, and the Commerce Department, with assistance from the intelligence community. To begin, BIS will solicit information from the public about the availability of CCL items outside our close allies to help us further differentiate the control of items by tier.

This proposed license exception regulation will identify in its preamble a number of commodities and technologies that we will be scrutinizing particularly closely to determine their tiering levels and, in doing so, whether the license exception will apply to them. We strongly urge companies not to overlook these items when preparing their comments.

Commerce, State, and Treasury are completing work on a consolidated license application form that would simplify the license application process. We intend to solicit public comments on this form soon. When combined with our effort to harmonize definitions and the creation of a new information technology system, this action would reduce compliance costs and burdens for exporters.

Finally, early next year, we plan to publish proposed revisions to the definitions of "specially designed," "technology," "publicly available," and "fundamental research" that would be common to the ITAR, the EAR, and the Treasury Department's sanctions regulations. We'll provide more detail on these and other harmonization proposals soon.

Compliance/Enforcement

In addition to these administrative export control reform efforts, we are working to enhance enforcement of U.S. export controls—that is, to build higher fences. We soon will post on the Internet a consolidated list of proscribed parties. This cost-saving tool will allow you to download all Department of Commerce, State, and Treasury lists to your own computer systems and run electronic screens to ensure that you don't inadvertently export to an ITAR-debarred party, a specially designated national, a denied person, or an entity on our Entity List.

We continue to seek ways to use the Automated Export System to flag non-compliant transactions, in order to address problematic exports before they reach their destinations. For example, the Census Bureau has imposed new electronic validations in AES that have increased the compliance rates on controlled transactions from 85 percent to better than 99 percent. We also are exploring additional ways to use AES to ensure that exporters know whether their items require licenses.

At the same time, the Government continues working to discourage illicit proliferation activities. BIS's Entity List, for example, was originally developed to list proscribed organizations involved in WMD proliferation. Beginning with the Mayrow case, Commerce has used the Entity List to shut down networks that pose threats in other areas of national security, including the security of our troops in Afghanistan and Iraq. We will continue to use the Entity List to encourage foreign companies to behave responsibly and to protect our servicemen and women, as well as our civilian population, from terrorist attacks.

BIS is also adjusting how we penalize those who violate U.S. export controls. In the past, BIS typically has imposed penalties on *companies* involved in export violations. Going forward, where a violation is the deliberate action of an *individual*, we will consider seeking penalties against that individual—including the denial of export privileges, fines, and imprisonment—*as*

well as against the company. The same will be true for supervisors who are complicit in deliberate violations by subordinates.

Finally, BIS is working with the FBI, Immigration and Customs Enforcement, and the intelligence community to implement the Export Enforcement Coordination Center that the President established by executive order on November 9th. The center will help law enforcement agencies coordinate and "deconflict" their activities, so as to better leverage their resources without duplicating or undermining one another's efforts in the field.

When we have implemented these actions, the Administration will have achieved what I term the three "Es":

Greater *efficiencies* in terms of focusing controls and investigations on those items that are the most significant in terms of providing the United States with a military or intelligence advantage, while facilitating exports to coalition partners in order to improve our interoperability.

Increase *education* to help exporters understand how the changes will affect their compliance responsibilities. Greater clarity in the control lists will simplify the educational effort. AES changes will help educate exporters about whether their items require licenses. We are also emphasizing the adoption of export management and compliance programs.

The final "E" is enhanced *enforcement*, to ensure that exporters and foreign end users comply with our regulations and use U.S.-origin items responsibly. BIS compliance personnel evaluate exports made under license or license exception to ensure they comply with the EAR. We review EAR99 transactions as well. Our enforcement agents are increasing their presence domestically and abroad, including new export control officers in China and Singapore, and we will leverage the resources of the FBI and ICE as participants in the Export Enforcement Coordination Center. Finally, we will continue to use all the law enforcement tools at our disposal, including the Entity List and temporary denial orders, to inhibit illicit trade in controlled items.

Strengthened International Trading System

Export control reform has occupied much of our energy in 2010 but it isn't the only initiative that will improve the way we implement dual-use export controls. BIS's bilateral relationships with other countries also play a role in strengthening the security of the international trading system.

India

Let me start with India, where on November 8th, Prime Minister Singh and President Obama committed to work together to strengthen the global export control framework and further transform bilateral export control regulations and policies to realize the full potential of the strategic partnership between our two countries. Commensurate with India's nonproliferation record and commitment to abide by multilateral standards, this will include removing Indian entities from our Entity List and realignment of India in the EAR.

We are preparing regulations to implement the first part of the President's announcement, including removing the remaining defense and space entities—Bharat Dynamics Limited, the listed subordinate entities of the Indian Space Research Organization, and the listed subordinate

entities of the Defense Research and Development Organization—from the Entity List. The removal of these entities is expected to facilitate trade and cooperation in civil space and defense, and enable the two governments to focus on addressing other barriers to high technology trade.

In addition, we soon will "realign" India in the Export Administration Regulations to reflect its status as a strategic partner, effectively treating India similarly to other close allies and partners. Although current dual-use export controls affect less than one percent of U.S.-India trade, the perception of onerous U.S. export controls has been a hindrance to high technology trade. This realignment will remove India from categories within the EAR that connote it as a "country of concern"—with a focus on Country Groups A and D. India will harmonize its national control list with the multilateral regimes and impose reexport controls on certain U.S.-origin items.

The President also announced our intention to support India's membership in the four multilateral export control regimes—the Nuclear Suppliers Group, Missile Technology Control Regime, Australia Group, and Wassenaar Arrangement. At the same time, India will move toward the full adoption of the regimes' export control requirements to reflect its prospective membership.

Further, both leaders reaffirmed previous assurances and end-use visit arrangements that provide the foundation for our bilateral export control cooperation. They also committed to a strengthened and expanded dialogue on such export control issues as capacity building, sharing of best practices, and industry outreach. These changes will bring fundamental change to the U.S. relationship with India, consistent with U.S. national security objectives.

China

BIS remains actively engaged with China under the auspices of the Joint Committee on Commerce and Trade's High Technology Working Group and as part of the State Department's bilateral nonproliferation dialogue. Last October, BIS led an interagency delegation to China for the High Technology Working Group meeting and we are looking forward to engaging again with China during the JCCT meeting later this month.

I recognize that U.S. export controls continue to be viewed as a hindrance to trade with China. To put the issue into perspective, though, of the $63.4 billion in U.S. exports to China in 2009, only one-third of one percent was exported under Commerce licenses. U.S. export control policy toward China continues to be that we encourage trade for civil end uses but do not support its military modernization. Thus, we require licenses even for low-level items that would be used to support China's military while permitting exports to Chinese end-users that demonstrate the ability to use U.S. technology responsibly.

Transshipment Countries

Our bilateral relationships with transshipment countries also continue to flourish, particularly in encouraging these governments to control sensitive items and interdict illicit trade. Our message is straightforward—effective export controls facilitate secure trade—and it is resonating.

Terrorist-Supporting Countries

Additionally, of course, our resources are focused on transactions involving countries of concern, most notably Iran. On October 5th, Secretary of State Clinton imposed new sanctions under the Iran Sanctions Act. We are revising § 744.19 of the EAR to impose a BIS license requirement for exports to entities sanctioned by the State Department under the authority of that statute.

Conclusion

As you can tell, BIS and its sister agencies have been busy. In addition to the export control reform and other efforts that I've outlined, we're continuing to do our regular jobs of export licensing and enforcement, treaty compliance, antiboycott compliance, participation in the CFIUS process, and helping monitor and protect the U.S. defense industrial base. It's exhausting but exhilarating for us all. Thank you for your support of our efforts.

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